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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1447

BURL RAINES,
Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Comes now petitioner and herewith respectfully submits this reply brief directed toward certain issues raised by the Brief in Opposition to Petition for Writ of Certiorari filed herein by respondent.

STATEMENT OF THE CASE

Respondent's recitations, appearing on pages 2, 3 and 4 are inaccurate and absolutely misleading! Exhibit A-48, the deposition of Richard L. Cross, the winchdriver, does contain the following testimony:

"Q. Were you able to see into the gondola car?

"A. No more than the upper parts of their body, and when they hook the loads up then they would get back in the clear for me to pick the loads up."

(page 10, lines 14 through 17, Deposition of Richard L. Cross)

Again, on pages 14 of the deposition the following statement of Richard L. Cross appears:

"At the winch controls I am one deck above the main deck. At the time of the accident the top of the ships rail was about six inches above the dock bull rail. At the winch controls I could see the men in the car, *but I could not see the steel bundles or lifts because of the sides of the gondola car.*
(Emphasis supplied)

(Page 14, lines 16 thru 21)

On page 17 of his deposition Richard L. Cross further testified as follows:

". . . but I could not see in the gondola car at the level of the steel because of the side of the gondola car."

(page 17, lines 9 thru 11)

Witness Cross also testified on page 19 of his deposition

". . . but from where I was I was just a very little above those guys in the gondola, and I could see only I guess from chest up, you see."

Another part of the Cross deposition refers to a letter written to witness Cross by an investigator who had investigated the facts and circumstances surrounding the accident and, referring to the winch operator, states as follows:

"Cross states that he had no idea as to either what happened inside the gondola, nor why it happened."

(Page 21, lines 14 to 16, Cross deposition) and on page 22 it continues

"Cross could not see into the car, except for the upper chest and heads of the men in there when they were at the west end of the car. They were out of his sight when they walked back into the east end, and this is where they went when the lift was made"

(Page 22, lines 11 thru 16, Cross deposition)

During the trial of this matter Cross testified as follows concerning his ability to see into the gondola car:

"Q. Okay. Now, when you came back from the coffee break did you notice whether or not you could see the men working in this gondola car that you were taking the steel out of?

"A. Only the top parts of their body. I mean the ship was down so low I could just see from maybe their waist up. I couldn't see down below around the knees or lower.

"Q. Okay. When they were trying to hook onto a load that was stowed in that gondola car, considering the level of the vessel and the dock and the tide right after the coffee break, *could you see down into the bottom of the gondola car at that time to see what they were doing*?

"A. *I couldn't see into the gondola car at any time.* I could just see the men up in the gondola, so much of their body. (emphasis supplied). (Tr. 330, lines 5 thru 19).

"Q. Now, Mr. Cross, on this load that eventually injured Mr. Raines, did you see how these slingmen in that car hooked up to that load? Did you see how they hooked up to it or hooked onto it when it was still stowed in the car?

"A. *No, I could not see into the car.* (emphasis supplied). (Tr. 332, lines 7 thru 11).

"Q. (By Mr. Goodwin) Mr. Cross, I want to ask you about part of that last answer. When these men asked you to pick this load up and re-land it, could you see them down in there using that snorter or could you see them putting that timber under the load?

"A. The only time I could see the timber was when the men was standing up with it in the air, *but when they went down in the car I couldn't see the operation down in the gondola.*" (Tr. 334, lines 21 thru 25, and Tr. 335, lines 1 to 4)

In an attempt to clarify some of his earlier testimony or statements in his depositions, Mr. Cross testified as follows:

"A. *But I think I also said that I couldn't see what was actually going on in the car,* but here I think it says that I had picked up the load and was holding it for them.

"Now, that could have been what I did. I could have been holding the load for them or they could have been putting a timber underneath. *Like I say, I don't know what they were doing inside of the car, the gondola.*" (emphasis supplied) (Tr. 358, lines 1 thru 7)

It is obvious from a reading of the quoted portions of the testimony of Richard Cross that he was unable to observe whether or not the load of steel was moving within the gondola car at any time prior to the occurrence of the accident in question.

The winch operator was operating "blind," since he could not see what movements, if any, the steel bundles were making within the car and since the hatchtender, Wylie, was also incapable of seeing into the gondola car. Under the circumstances, whether the load was raised by Cross under the "blind" but mistaken assumption that it was safe to do so, or, whether the load was caused to raise and swing due to the action of the vessel, it was impossible for any corrective action to be taken by the winch operator to protect the men in the car since the winch operator could see nothing within the car and the hatch tender was in no position to provide any assistance.

With all due respect to counsel for respondent, he has engaged in an attempt to artificially create a reasonable basis for the decision of the trial court, and/or for that of the Court of Appeals, by setting forth certain portions of the testimony touching on whether the load was being lifted when Raines was injured, whether the load was hanging in the air, whether the winch driver was at the controls, who was giving signals to the winch driver, etc. As has previously been asserted by petitioner, those issues are absolutely irrelavent to the determination of the issues before this court! Regardless of how one might resolve those minute factual disputes, the fact remains that the load of steel swung and crushed Raines against the side of the gondola car, that the load could only have been caused to raise from the position where it had been re-landed and to swing to the point where it hit Raines for one of two reasons, i.e. the rolling action of the vessel or the operation of the winches, and that, regardless of which of these two reasons caused the load to lift and swing and injure Raines, the lifting and/or the swinging of the load could have been prevented if either the winch driver or the hatch tender had been able to see into the gondola car!

On page 8 of his brief, counsel for respondent discusses "Other Possible Causes of Accident," which discussion is completely immaterial since petitioner has never claimed that the condition of the hoisting gear or the lighting contributed to the cause of his accident.

Under the heading, "Unusual Rolling of Ship," counsel again tries to convince this court that the ship did not "move," and/or that it did not move enough to cause the load of steel to swing and injure petitioner. Petitioner has

consistently asserted from the time of trial of this matter to the present, that it makes no difference whatsoever whether the rolling of the ship, or the operation of the winch caused the load of steel to swing, since either cause could have been detected and corrected had defendant positioned a hatch tender at a point where he could observe what was going on within the gondola car and who could then relay that information and/or instructions to the winch operator.

Under the heading, "Need for Extra Signalman," counsel again is apparently attempting to provide some reasonable explanation for the trial courts dismissal of petitioner's cause of action. It should be remembered at this point that the memorandum opinion of the trial court indicated, in substance, that *some* witnesses testified untruthfully about *some* issue. For that reason the court could not figure out, "how this accident happened." As has been previously pointed out, such a conclusion by the trial court is totally unfounded in fact or law, since no amount of untruthful testimony (if such existed) could alter the fact that the load did move and swing to the point where it hit and injured petitioner and that the occurrence of the accident in that manner could easily have been prevented had the winch operator not been operating *blind*!

ARGUMENT

Counsel for petitioner will not re-state his contentions to the effect that the decision in the case at bar is in conflict with the decision of the United States Court of Appeals for the Fourth Circuit concerning the case of *Tucker v. Calmar Steamship Corporation*, 457 F.2d 440 (4 Cir. 1972), and the case of *Burns v. Anchor-Wate Co.*,

469 F.2d 730 (5 Cir. 1972), since a simple reading of the opinions in both of these cases will demonstrate the inaccuracy of respondent's contentions at this point in his brief.

Finally, with reference to the comments made by respondent under the subheading, "The Questions Presented by Petitioner are Groundless," counsel for petitioner cannot follow the comments made under that sub-heading and therefore will not attempt to reply thereto. However, since the case of *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S. Ct. 414, 27 L. Ed. 2d 562 (1971) is mentioned under that subheading, and since respondent's comments with respect to the *Usner* case are somewhat confusing, petitioner wishes to state that, as he has maintained from the time of trial to the present, that the conduct of respondent's employees constituted a series of connected acts, all of which culminated in a condition of unseaworthiness, i.e. an unsafe method of loading which proximately resulted in petitioner's injuries. Counsel for petitioner was shocked, to say the least, to note the reference to and citation of the *Usner* case in the opinion of the United States Court of Appeals for the Ninth Circuit since the facts of the *Usner* case and the principles set out in that opinion are so clearly inapplicable to the case at bar.

Respectfully submitted,

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